NOT DESIGNATED FOR PUBLICATION

ARKANSAS COURT OF APPEALS

DIVISION I
No. CACR08-93

JAMES DAVID KING APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** October 1, 2008 APPEAL FROM THE CRITTENDEN COUNTY CIRCUIT COURT, [NO. CR-2006-1497] HONORABLE DAVID N. LASER, JUDGE REVERSED and REMANDED

LARRY D. VAUGHT, Judge

Appellant James David King was convicted of second-degree murder in Crittenden County Circuit Court. King was sentenced to twenty years' imprisonment in the Arkansas Department of Correction. On appeal, King argues that the trial court erred in refusing his proffered jury instruction on justification. We reverse and remand for a new trial.

In November 2006, King and William Smith, who were transients, were living under a bridge in West Memphis, Arkansas. On December 5, 2006, King and Smith encountered Ed Roe, also a transient. Roe advised King and Smith that he had rented a room at the Motel 8 and invited them to the room to clean up and change clothes. King and Smith accepted the offer. Roe later told King and Smith that he had found work polishing a truck, and he offered to share the job with them. Roe told King that with the money they earned they could stay

in the motel another night. King agreed to help with the work. But Smith, who was drunk and passed out, stayed in the motel room.

Roe and King headed to the Petro Truck Stop in West Memphis and began working on the truck. King stated that he performed extra polishing work, which upset Roe, who "went ballistic," yelled at King, and then punched him twice in the face. According to King, Roe reached toward his pants pocket, where King knew Roe carried a knife.[1] King reached into his own pants pocket, pulled out a knife, and stabbed Roe seven times. According to the medical examiner, one of the stab wounds severed Roe's jugular vein, causing his death.

After the stabbing, King left the Petro Truck Stop and returned to the motel. He showered, changed his clothes, woke up Smith, and they left. However, about one hundred yards from the motel, they were stopped by local law-enforcement officers investigating the murder. When the officers noticed blood on King's boots, they *Mirandized* him, at which time King stated, "Yes, I cut the motherfucker."

At trial, King proffered a justification jury instruction based on AMCI 2d 705:[2]

> James David King asserts as a defense to the charge of murder that deadly

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[1]King stated that "we [transients] all carry knives and that is right where we carry them."

[2]AMCI2d 705 is patterned after Arkansas Code Annotated section 5-2-607(a)(1)(2) (Supp. 2007), which provides for the use of deadly force in defense of a person and states, in pertinent part:

> (a) A person is justified in using deadly physical force upon another person if the person reasonably believes that the other person is:
> (1) Committing or about to commit a felony involving force or violence; [or]
> (2) Using or about to use unlawful deadly physical force; . . . .

physical force was necessary to defend himself. This is a defense only if:

> FIRST: James David King reasonably believed that Ed Roe was committing or was about to commit battery second degree, with force or violence; or
>
> James David King reasonably believed that Ed Roe was using or was about to use unlawful deadly physical force; and
>
> SECOND: James David King only used such force as he reasonably believed to be necessary.

The trial court refused to instruct the jury on both alternatives of the first element of the justification instruction. The trial court specifically refused the alternative allowing for the use of deadly physical force upon a reasonable belief that Roe was committing *or about to commit a felony involving force or violence*. The trial court reasoned that "[h]itting someone upside the face with your fists is not a felony." Instead, the trial court instructed only as to the second alternative of the first element,[3] stating that:

> [T]he second prong covers it. Deadly force covers it. I mean, we're still talking about the fear in the defendant's mind that Mr. Roe had a knife in his pocket that he was reaching for.

On appeal, King argues that the trial court erred in denying his proffered jury instruction on justification, because there was some evidence to support his belief that Roe was committing

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[3]The actual instruction given at trial provided:

> James David King asserts as a defense to the charge of Murder that deadly physical force was necessary to defend himself. This is a defense only if:
>
> First: James David King reasonably believed that Ed Roe was using or was about to use unlawful deadly physical force; and
>
> And Second: James David King only used such force as he reasonably believed to be necessary.

or about to commit a felony involving force or violence.[4]

A party is entitled to a jury instruction when it is a correct statement of law and when there is some basis in the evidence to support giving the instruction. *Hamilton v. State*, 97 Ark. App. 172, 245 S.W.3d 710 (2006). Moreover, a trial court is required to give a jury instruction if there is some evidence to support it. *Id*. Where the defendant has offered sufficient evidence to raise a question of fact concerning a defense, the instructions must fully and fairly declare the law applicable to that defense. *Sharp v. State*, 90 Ark. App. 81, 204 S.W.3d 68 (2005).

> Our role is not to weigh the evidence to determine if the justification instruction should have been given. Instead, the standard requires that we limit our consideration to whether there is any evidence tending to support the existence of a defense. If there is such evidence, then the justification instruction must be submitted to the jury so that it can make the factual determination as to whether the charged conduct was committed in self-defense.

Sharp, 90 Ark. App. at 90, 204 S.W.3d at 75 (citing *Humphrey v. State*, 332 Ark. 398, 410, 966 S.W.2d 213, 219 (1998)). A trial court's ruling on whether to submit jury instructions will not be reversed absent an abuse of discretion. *Mainard v. State*, ___ Ark. App. ___ , ___ S.W.3d ___ (Apr. 30, 2008).

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[4]The State argues that King failed to preserve this argument because he failed to include the definition of second-degree battery in his proffered instruction. We disagree. The proffered justification instruction is in the record and in King's addendum. While the proffered instruction does not include a definition of second-degree battery, King did recite a definition to the trial court during jury-instruction arguments. King's counsel stated: "I've put in battery second degree as a felony and defined it that a person commits battery second degree with the purpose of causing physical injury to another caused serious physical injury [sic]. That's taken from the AMI instructions with the other definitions under there." Based on these facts, King preserved the issue for appeal.

The facts in the case at bar are nearly identical to those in *Hamilton*. There, Hamilton arrived uninvited at a party. He was confronted by two of the guests who called him a "queer." Afraid, he left the party but was followed by several guests who were anticipating a fight. At least three young men "squared off" against Hamilton, who then drew a knife from his pocket. When one of the guests "swung" at him, he stabbed the guest through the heart with the pocket knife and killed him. *Hamilton*, 97 Ark. App. at 175, 245 S.W.3d at 712.

Hamilton proffered the same jury instruction that King proffered in the instant case. The State opposed giving both alternatives of the justification instruction, arguing that it was "an either/or proposition." *Id.* at 175, 245 S.W.3d at 712. The State further contended that the first alternative was only "intended for occasions when you have something other, like a rape or a robbery, because it says commits a 'blank' felony with force or violence." *Id.*, 245 S.W.3d at 712. The trial court agreed with the State and instructed the jury only on the "unlawful deadly physical force" alternative. *Id.*, 245 S.W.3d at 712. Hamilton was convicted of second-degree murder. *Id.* at 174, 245 S.W.3d at 711.

On appeal, we reversed and remanded, stating:

> There is a presumption that the model instruction is a correct statement of the law, *Porter v. State*, 358 Ark. 403, 191 S.W.3d 531 (2004), and we believe that the plain wording of subsection (a) of our justification statute is fully and faithfully reflected in AMCI 2d 705. Because second-degree battery has as one of the elements the infliction of serious physical injury, we must conclude that it is a "felony involving force or violence." Ark. Code Ann. § 5-13-202 (Repl. 2006). Accordingly, the trial court erred in refusing to give both relevant alternatives in the instruction. Furthermore, the prejudice to Hamilton's case is patent; it is a much more daunting task under these facts to convince a jury that he was confronted with unlawful deadly physical force than to prove that the individuals who were arrayed against him were likely to cause serious physical injury.

Hamilton, at 176, 245 S.W.3d at 713.

The similarities between *Hamilton* and *King* are striking. King, just like Hamilton, was faced with an aggressor's swing or punch and turned a knife on the aggressor in response. In *Hamilton*, we held that because second-degree battery included the element of infliction of serious physical injury, the party guest's "swing" at Hamilton was "some evidence" supporting the "felony involving force or violence" alternative of the justification instruction.

All that the accused in *Hamilton* was faced with was a "swing" from a party guest, which our court held warranted the second-degree battery alternative of the justification instruction. Here, King testified that he was actually punched twice in the face and that he believed that he was about to be attacked with a knife. This testimony demonstrates "some evidence" supporting the second-degree battery alternative of the justification instruction. Therefore, we hold that the trial court abused its discretion in refusing to give King's proffered justification jury instruction, which included the "felony involving force or violence" alternative.

Reversed and remanded.

GLOVER and BAKER, JJ., agree.